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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Crafty Productions, Inc., a California corporation, and CPI Productions, LLC, a California company,

Plaintiffs,

vs.

Fuqing Sanxing Crafts Co. Ltd., a China company, Tony Zhu, an individual, MRF Associates, Inc., a Massachusetts corporation, Michelle Faherty, an individual, The Michaels Companies, Inc., a Delaware corporation, Michaels Stores, Inc., a Delaware corporation, Plaid Enterprises, Inc., a Georgia corporation, Hobby Lobby, Inc., an Oklahoma corporation, Sbars, Inc., a New Jersey corporation, A.C., Moore Arts & Crafts, Inc., a New Jersey corporation, 99 Cents Only Stores, Inc., a California corporation, Dollar Tree, Inc., a:Virginia corporation, Jo-Ann Stores, LLC, an Ohio company, Party City Holdings, Inc., a Delaware corporation, Party City Corporation, a Delaware corporation, ZheJiang HongYe Co. Ltd., a China company, Fuzhou Bomy TradingCo., Ltd., a China company, Fuzhou Great Suns Co. Ltd., a China company, Sunface Crafts Co. Ltd., a China company,

Defendants.

Case No. 15-cv-00719-BAS-JLB

Assigned to: Hon. Cynthia Bashant
Courtroom No.: 4B 4TH Floor

DEFENDANTS MICHELLE FAHERTY AND MRF ASSOCIATES, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION TO DISMISS PURSUANT TO FRCP 12(B)(2) FOR LACK OF PERSONAL JURISDICTION

Date: October 5, 2015

Complaint Filed: April 1, 2015
Trial Date: None

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MEMORANDUM OF POINTS AND AUTHORITIES

Defendants Michelle Faherty and MRF Associates (collectively hereinafter the "MRF Defendants" or the "Defendants") respectfully submit this Memorandum in support of their Motion to Dismiss Pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure for Lack of Personal Jurisdiction. For the reasons that follow, the Court should grant MRF Defendants' Motion and dismiss them from the instant action. The Defendants respectfully request that this Court permit oral argument on this Motion at the September 21, 2015 conference, or as soon thereafter as this Court may permit.

STATEMENT OF RELEVANT FACTS

The Complaint of the Plaintiffs, Crafty Productions, Inc. and Crafty Productions LLC (collectively hereinafter as "Crafty" or "CPI") comprises a rambling, disjointed series of vague allegations by the Plaintiffs against approximately twenty (20) defendants, alleging a tale of copyright infringement, trade dress infringement, breach of contract, and related claims over its alleged proprietary craft products. The Plaintiffs have brought this omnibus action against a variety of Chinese companies and retailers, while dragging in Defendants Faherty and MRF Associates. Discerning the allegations against the MRF Defendants in this mishmash of a Complaint is a challenge, as is sifting through the claims of this supposed wide-ranging conspiracy.

With her business MRF Associates, Michelle Faherty is a manufacturers' representative in craft products, residing in Hopedale, Massachusetts, which is a suburb in the greater metropolitan Boston region. Faherty's manufacturers' representative business is conducted almost exclusively by telephone and by email and/or text, and she dealt with the Plaintiffs through electronic communications and by telephone. Excluding a social, "grab a cup of coffee" meeting long after their business relationship ended, the MRF Defendants never had any in-person meetings with the Plaintiffs in California. Indeed, after the Fuqing/Crafty transaction in early

2014 and as set forth in the Complaint and its attachments (*See* Complaint, ¶ 40 & Exhibits N-Q), Faherty and MRF had no business dealings whatsoever with the Plaintiffs.

In sharp contrast to the retailer defendants and/or the Chinese defendants, Defendant Faherty has no stores or physical locations in any state (other than her home in Hopedale, Massachusetts), never had a written contract with the Plaintiffs as to her manufacturers' representative business, and never received a single payment from Crafty. Except for a social, "grab a cup of coffee" visit in November 2014, Faherty never met with Crafty or Paula Mello in California.

Furthermore, as the Complaint details, CPI entered into a series of agreements with Defendant Zhu and Fuqing, in which Defendant Fuqing allegedly obtained a 33 % ownership in CPI, was supposedly obligated to make a $100,000 contribution, provide sales reports, royalties and other obligations. Unfortunately for the Plaintiffs, the MRF Defendants have nothing to do with these transactions, were never a party to them, and were essentially cut out of any ongoing business by the transaction.

As described below, there is no basis for this Court to assert personal jurisdiction over the MRF Defendants in the Southern District of California, and no reason for Faherty to believe that she would be haled into federal court in such forum. This Court should dismiss the Complaint as to Defendants Faherty and MRF Associates for lack of personal jurisdiction.

ARGUMENT

I. THE COMPLAINT SHOULD BE DISMISSED AGAINST THE MRF DEFENDANTS FOR LACK OF PERSONAL JURISDICTION

A. Standard of Review

Under Fed. R. Civ. P. 12(b)(2), CPI bears the burden of establishing that this Court has personal jurisdiction over MRF Defendants. *See Boschetto v. Hansing*, 539 F.3d 1011, 1011 (9th Cir. 2008). Here, CPI cannot "simply rest on the bare

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allegations of its complaint," but rather must "come forward with facts, by affidavit or otherwise, supporting personal jurisdiction." *Amba Marketing Systems, Inc. v. Jobar Intern.*, 551 F.2d 784, 787 (9th Cir. 1977).

CPI must demonstrate that personal jurisdiction is appropriate under California's long-arm statute and that the exercise of jurisdiction comports with the requirements of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *See* Cal. Code. Civ. Proc. §410.10; *see also Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1317 n. 2 (9th Cir. 1998). A court may exercise personal jurisdiction over a non-resident defendant consistent with due process only if he or she has "certain minimum contacts" with the forum state "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945)(internal quotations omitted). There are two forms of personal jurisdiction that a forum state may exercise over a non-resident defendant – general jurisdiction and personal jurisdiction. For the reasons stated below, the MRF Defendants are subject to neither.

B. The Court Lacks General Jurisdiction Because the MRF Defendants' Contacts with California Do Not "Approximate Physical Presence."

General jurisdiction exists where the business contacts with the forum state are so substantial, continuous and systematic that they "approximate physical presence." *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000). The types of contacts with a forum state determined by courts to confirm general jurisdiction include, ownership of property, the maintenance of bank accounts, having employees, soliciting business, or having a designated agent in the state. *See Glencore Grain v. Shivnath Rai Harnarain*, 284 F.3d 1114, 1124-25 (9th Cir. 2002). Conversely, "engaging in commerce with residents of the forum state is not in and of itself the kind of activity that approximates physical presence within the state's borders." *Bancroft & Masters, Inc.*, 223 F.3d at 1086.

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The MRF Defendants' contacts with California do not approximate those necessary to confer general jurisdiction. *See generally*, Declaration of Michelle Faherty (hereinafter the "Faherty Declaration"). Like the defendant in *Glencore Grain*, who the court found lacked the necessary contacts to support general jurisdiction, the MRF Defendants do not own property, maintain bank accounts, have employees, solicit business, or have a designated agent in the state of California. Therefore, this Court does not have general personal jurisdiction over the MRF Defendants.

C. The Court Lacks Specific Jurisdiction Because the MRF Defendants Have Not Purposefully Directed Activity to California, and because the exercise of jurisdiction would be unreasonable.

Courts in the Ninth Circuit use a three-part test to determine whether specific jurisdiction exists: (i) the nonresident defendant must purposefully direct his activities or consummate some transaction with the forum or residents thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (ii) the claim must be one which arises out of or relates to the defendant's forum-related activities; and (iii) the exercise of jurisdiction must comport with fair play and substantial justice, i.e., it must be reasonable. *Boshcetto v. Hansing*, 539 F.3d at 1016. All three prongs must be met, and the inability to satisfy any of the aforementioned prongs will result in the failure to establish jurisdiction over the defendant. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004). Moreover, the plaintiff bears the burden of satisfying the first two prongs of the test. *Id*. If the plaintiff succeeds in satisfying both of the first two prongs, the burden shifts to the defendant to "present a compelling case" that the exercise of jurisdiction would not be reasonable. *Id.*

The Ninth Circuit analyzes the first two prongs for personal jurisdiction, purposeful availment and purposeful direction, as two separate analyses. In tort cases involving purposeful direction, the Court evaluates such prong under the

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"effects" test from *Calder v. Jones*, 465 U.S. 783 (1984). *See Dole Food Co, Inc. v. Watts*, 303 F.3d 1104 (9th Cir. 2002). Under *Calder*, the "effects" tests requires that the defendant allegedly (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state. *Id*.

In analyzing the second prong required for personal jurisdiction, that a claim must arise out of the defendant's forum-related activities, the courts apply a "but for" test. *John Doe v. Unocal Corp.*, 248 F.3d 915, 924 (9th Cir. 2001). The "but for" test is a simple test where the Plaintiff must demonstrate that the claims against the Defendant would not have arisen "but for" the Defendant's contacts with the forum state. *See Ballard v. Savage*, 65 F.3d 1495, 1500 (9th Cir. 1995).

If the Plaintiff meets its burden of satisfying the first two prongs, then the Court must analyze the third and final prong for jurisdiction, reasonableness, by considering the following seven factors: (1) the extent of the defendant's purposeful interjection into the forum state's affairs; (2) the burden on the defendant of defending in the forum; (3) the extent of conflict with the sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interests in convenient and effective relief; and (7) the existence of an alternative forum. *Core-Vent Corp. v. Nobel Industries AB*, 11 F.3d 1482, 1487-88 (9th Cir. 1993). None of the factors are dispositive, and they must be balanced together. *Id*.

1. The MRF Defendants Have Not Purposefully Directed Activity to the State of California.

Under the first prong of a specific jurisdiction test, CPI must demonstrate that the MRF Defendants "purposefully availed" themselves of the privilege of conducting activities in California, or purposefully directed its activities towards California. *Schwarzenegger*, 374 F.3d at 802. While the Courts typically use "purposeful availment" in shorthand fashion to include both purposeful availment and purposeful direction, "availment" and "direction" are two distinct concepts that undergo two distinct analyses. *Id*. Purposeful availment, which involves a showing that a defendant purposefully availed himself of the privilege of doing business in a forum state, typically consists of evidence of the defendant's actions in the forum, such as executing or performing a contract in the forum. *Id*. at 803. Purposeful direction, by contrast, involves a showing that a defendant purposefully directed his tortious conduct toward the forum state, and applies the three-part *Calder* effects test promulgated by the U.S. Supreme Court. *Id*. CPI fails to satisfy the first prong of the jurisdictional analysis regardless of whether a purposeful availment or purposeful direction test is utilized.

Purposeful Availment

"The purposeful availment inquiry ... focuses on the defendant's intentionality." *See Snowney v. Harrah's Entertainment, Inc.*, 35 Cal.4th 1054, 1062 (2005). This prong is only satisfied when the defendant purposefully and voluntarily directs activities toward the forum so that the defendant should expect, by virtue of the benefit it receives, to be subject to the court's jurisdiction based its contacts with the forum. *Id*.

To the extent that the MRF Defendants' alleged contacts with California were in response to CPI's initiated communications, such contacts do not support personal jurisdiction. Foreseeability requires that the contacts also must be of a nature that the defendant could reasonably anticipate being haled into court there. *World Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 287 (1980). As such, the MRF Defendants' mere awareness of CPI's presence in California is not sufficient to establish personal jurisdiction. Moreover, inter-party communications "by phone or mail are insufficient to demonstrate purposeful availment."

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Purposeful Direction

For claims sounding in tort, the purposeful direction requirement for specific jurisdiction is analyzed under the "effects" test derived from *Calder v. Jones*, 465 U.S. 783. *See also Menken v. Emm*, 503 F.3d 1050, 1059 (9th Cir. 2007) (holding that where the "cause of action arises primarily in tort…*Calder's* "effects" test is the proper framework"). A claim for copyright infringement sounds in tort. *Brayton Purcell LLP v. Recordon & Recordon*, 361 F. Supp. 2d 1135, 1140 (N.D. Cal. 2007). *Calder*'s effects test requires that the defendant allegedly have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state. *Menken* 503 F.3d at 1058. While CPI has alleged that the MRF Defendants committed an intentional act, the remaining requirements of *Calde*r's effects test are lacking.

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a. The MRF Defendants Did Not Commit an Intentional Act "Expressly Aimed" at California.

The second prong of the *Calder* test, the requirement of "express aiming" is satisfied where the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state. *Calder* 465 U.S. at 789. As a non-party to the transactions with Fuqing, and having no involvement with CPI's business in California, the MRF Defendants could not reasonably anticipate, let alone expressly aim, any harm towards the Plaintiffs.

b. The MRF Defendants Did Not Knowingly Cause CPI to Suffer Harm in California.

Even if the "express aiming" requirement were satisfied, CPI has failed to demonstrate that, by its pleadings or its voluminous Exhibits, the MRF Defendants knowingly caused CPI to suffer harm in California. The Pleadings are devoid of any allegations which reflect that MRF or Faherty caused harm to be suffered by CPI in California. As a result, the Plaintiffs have failed to meet this prong of the Ninth Circuit's test.

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2. The MRF Defendants have no meaningful contact with California and their alleged acts do not arise from contact with California.

The second prong for specific jurisdiction is that plaintiff's claim arises out of defendant's forum-related activities. *Core-Vent Corp.*, 11 F.3d at 1485. In analyzing whether the plaintiff's claims arise out of the defendant's forum-related activities, the courts apply a "but for" test. *John Doe,* 248 F.3d at 924. The "but for" test is a simple test where the Plaintiff must demonstrate that the Plaintiff's claims against the Defendant would not have arisen "but for" the Defendant's contact with the forum state. *See Ballard* 65 F.3d at 1500.

The evidence upon which CPI relies is improperly authenticated evidence. It would not be sufficient to find that CPI's claims against the MRF Defendants would not have arisen but for the MRF Defendants' alleged contacts with California.

As stated above, the crux of CPI's claims against the MRF Defendants is that MRF Defendants allegedly helped reproduce, distribute and/or sell "knock off" and/or substantially similar copies of CPI's original designs and products. CPI's claims do not pertain to the MRF Defendants' alleged connection to California, but rather to the MRF Defendants' contacts in China. Accordingly, CPI's claims against the MRF Defendants are not asserted "but for" MRF Defendants' alleged contacts in California – rather, those claims are solely focused on the MRF Defendants' activity and business contacts in and about China and across the United States.

3. The Exercise of Jurisdiction Over the MRF Defendants Is Not Reasonable

The third part of the personal jurisdiction analysis examines whether the exercise of the jurisdiction would be reasonable. Courts consider the seven factors listed above when making this determination. These factors weigh in favor of the MRF Defendants.

The first factor has been discussed in detail above. The MRF Defendants' only contact with California involved electronic communications with the Plaintiff and

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one in-person meeting in November 2014. The MRF Defendants did not purposely direct sales towards California. Further, the MRF Defendants do not live in California, do not operate a California business, do not have California-based employees, do not have a registered agent in the state, and do not advertise in the state. The MRF Defendants, then, can hardly be said to "purposefully interject" into California's affairs.

Additionally and with respect to the second factor, the burden on the MRF Defendants of defending in California is substantial. Defendant Faherty operates MRF Associates as a small company. She has no employees, and runs the entire business by herself from her home. Defending in California would require Faherty to travel across the country, an expensive and time-consuming proposition given that she is the sole person running her business. (Faherty Decl.) This factor favors the MRF Defendants.

The third factor is neutral, as there is no apparent conflict between the sovereignty of California and Massachusetts.

Regarding the fourth factor, the MRF Defendants assert that California has little to no interest in adjudicating this dispute. Although Crafty is a California business, the allegations involve business activities and events throughout the United States and in China. Faherty is a small piece of an alleged wide-ranging copyright infringement action, and other states, including the Commonwealth of Massachusetts, have a comparable interest in adjudicating this dispute.

The fifth factor, concerning the efficiency of the forum, is neutral. "In evaluating this factor, [the courts look] primarily at where the witnesses and the evidence are likely to be located." *Core-Vent Corp* 11 F.3d at 1489. In this case, the federal courts in California are comparable to the federal courts throughout the country, and in Massachusetts.

The convenience and effectiveness of relief for the plaintiff comprise the sixth factor. "[I]n this circuit, the plaintiff's convenience is not of paramount importance."

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Dole Foods Co., 303 F.3d at 1116. While it may be more convenient for CPI to have this dispute adjudicated in California, it is hard to see how resolution of the case in California would be any more effective than in Massachusetts. Given the weight accorded this fact by the Ninth Circuit courts, it is largely without importance.

The seventh and final factor is the availability of an alternate forum. CPI bears the burden of proving the unavailability of an alternative forum. *Core-Vent Corp.*, 11 F.3d at 1490. CPI cannot meets its burden in this regard. It cannot be disputed that, because the MRF Defendants reside in Massachusetts, Massachusetts provides an alternative forum for this dispute. Weighing all of these seven considerations, the balance of factors clearly favors the MRF Defendants.

As demonstrated above, this court can assert neither general nor specific personal jurisdiction over the MRF Defendants.

CONCLUSION

As set forth above, the MRF Defendants respectfully submit that this Court should dismiss the instant action pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure for lack of personal jurisdiction. The MRF Defendants contend that they are not subject to personal jurisdiction in this state and they must be dismissed from this action. The MRF Defendants respectfully request oral argument on this Motion at the September 21, 2015 conference.

Dated: August 31, 2015

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By: /s/ Michael G. King

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CERTIFICATE OF SERVICE

I, Michael G. King, hereby certify that on this 31st day of August, 2015, I filed the foregoing using the CM/ECF system, which caused the foregoing to be served to all parties, by and through their counsel of record, on an electronic basis.

Executed on August 31, 2015, at Marina del Rey, California.

/s/ Michael G. King
Michael G. King